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January 7, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 2, 2004

Case No.: TIA-0151

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contactor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible

for this program, and its website provides extensive information concerning the program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

### *B. Procedural Background*

The Applicant was employed as an instrument mechanic at the Paducah Gaseous Diffusion Plant (the Plant). He worked at this Plant for approximately 25 years, from March 1974 to January 1999.

The Applicant filed an application with the OWA, requesting that a physician panel review his claims of a nodule on the right lung and heavy metal poisoning. The Applicant asserted that his illnesses were due to exposure to toxic and hazardous materials and chemicals. The Physician Panel rendered negative determinations with regard to both illnesses. The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was

related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

In his appeal, the Applicant asserts that exposure to "different toxins, radiation, contamination, and heavy metals (beryllium, uranium, and plutonium) must have contributed to [his] current condition."<sup>1</sup> In support of this assertion, the Applicant states that he "performed cell changes without a respirator," later wore respirators that covered only one-quarter or one-half of his face, and worked during "releases" in the Plant building.<sup>2</sup> The Applicant also contends that he was a "healthy person" before working at the Plant and that these "illnesses were not a part of [his] life before [his] employment there."<sup>3</sup>

In the course of evaluating the Applicant's claim of a nodule on the right lung, the Physician Panel reviewed occupational clinical records and chest x-rays, dosimetry readings and personal medical records. Subsequent to its review of these materials, the Panel stated that a biopsy of the nodule "was reported as a benign caseating granuloma consistent with a history of a positive TB skin test."<sup>4</sup> The Panel further noted that the "only likely potential occupational candidate for producing this benign granuloma would have been beryllium exposure."<sup>5</sup> However, the Panel ruled out this possibility, concluding that the "negative lymphocyte proliferation test [performed in May 2002], argues against any significant inflammatory response that could conceivably develop into a granuloma."<sup>6</sup> For these reasons, the Panel ruled out the possibility that the Applicant's lung nodule resulted from occupational exposure at the Plant.

The Panel also addressed the Applicant's claim of heavy metal poisoning. It reviewed the results of a 2001 hair analysis test, but noted that the status of such analysis "in 2001 was unreliable as noted by a major article in the Journal of the American Medical Association."<sup>7</sup> In addition, the Panel also examined the results of March 2001 and April 2001 urine tests. In its report, the Panel provided a

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<sup>1</sup> Applicant's Appeal Letter.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Panel Report.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

detailed review of these medical records. However, it ultimately determined that these tests did not support a diagnosis of heavy metal poisoning.

As the foregoing indicates, the Physician Panel addressed the Applicant's claims, made a determination, and explained the reasoning for its conclusion. Therefore, the Applicant's argument that his exposure to toxic substances caused his lung nodule and heavy metal poisoning is merely a disagreement with the Panel's medical judgment, rather than an indication of error on the part of the Panel. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0151 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: January 7, 2005